
This paper was prepared with the assistance of
The Independent Film and Television Alliance,
which provided access to commercially available **data** bases, arranged for
interviews with its members, and provided financial support.

TABLE OF CONTENTS

EXECUTIVE SUMMARY.....	1
I. INTRODUCTION..	11
The Emergence of A Vertically Integrated Oligopoly in Television	
The Effect of the Vertically Integrated Oligopoly on the Television Market	
Policy Implications of Consolidation and Integration	
Policies to Promote Diversity	
Outline	
II. DEFINING THE PRODUCT SPACE AND ANALYTIC APPROACH	20
The Object of Study	
Analytic Approach Structure, Conduct Performance	
Horizontal Market Power	
Monopsony Power	
Vertical Integration and Leverage	
Conclusion	
III. PUBLIC POLICY AND THE EMERGENCE OF A VERTICALLY INTEGRATED VIDEO ENTERTAINMENT OLIGOPOLY.....	34
The Repeal Of The Financial and Syndication Rules Triggered Horizontal Concentration and Vertical Integration	
Strategic Moves	
The Current State of the Video Product	
Entertainment Space	
Vertical Integration	
Horizontal Concentration	
The Conditions for the Exercise of Market Power	
IV. DOMINATION OF THE BROADCAST PRODUCT SPACE..	.48
Prime Time on Broadcast Network Television	
New Shows and Pilots	
Syndication	
TV Movies, the Role of Cable	
Access to Television is Crucial to The Health of Independent Producers	

V. THE IMPACT OF MARKET STRUCTURE ON INDEPENDENT PRODUCTION.....	.46
--	-----

The Critical Role of Gate **Keeping**: Policy and Vertical Integration
 Market Structural Impacts **of** Horizontal Concentration and
 Vertical Integration on Independent Producers
 Favoring Affiliates
 Monopsony Power

VI. THE DEBATE OVER QUALITY..	60
-------------------------------	----

Qualitative Observations
 Quantitative Measures **Of** Quality
 Movies
 Television

VI. CONCLUSION: SOURCE DIVERSITY HAS BEEN UNDERMINED BY PUBLIC POLICY: WILL THE INTERNET CHANGE ANYTHING?	71
---	----

Vertical Integration Trumps Technology
 The Internet
 Conclusion

I. INTRODUCTION & OVERVIEW

THE EMERGENCE OF A VERTICALLY INTEGRATED OLIGOPOLY IN TELEVISION

This paper examines the impact of three major policy changes in the early and mid-1990s on the production and distribution of video content, primarily broadcast television programming in America: the repeal of the Financial Interest / Syndication rules and the enactment of both the Cable Act of 1992 and the Telecommunications Act of 1996.¹ The paper also considers how the production and distribution of movie programming for cable and theatrical release were affected. It shows that these policy changes led to the formation of a vertically integrated oligopoly in television entertainment and a dramatic shrinkage of the role of independent producers of content. The policy changes and resulting alterations in market structure and behavior were not limited to the broadcast sector, however. They also affected the syndication market, cable television and theatrical movies because prime time programming plays a critical role in the overall video entertainment product space. If not amended, these same policy changes could have a major impact upon the ability of independents to offer product through the Internet and other developing digital platforms, including the rapidly approaching digital multi-cast channels.

Over the course of a decade, the content aired on prime time network television, TV syndication, basic and pay cable channels, and theatrical movies came to be dominated by a handful of vertically integrated entities? Dozens of independent entities that produced video

¹ See Chapter III for a discussion of these policy changes and their impact on industry structure.

² See Chapter IV for a detailed description of the changes in program sources that followed the policy and structural changes in the industry.

content were replaced by a handful of **firms** that own major movie studios and television production units, hold multiple broadcast licenses and own the dominant cable networks. The role of independent producers **has** been squeezed across all distribution platforms.

By two widely accepted economic measures **of** market concentration, the Herfindahl-Hirschman Index (HHI) and the market share of the top four firms (the 4 Firm Concentration Ratio or CR-4), the video market has become a concentrated, vertically integrated, tight oligopoly. As a result, this oligopoly engages in a number **of** predatory business practices that both limit competition from independents and deprive the public of new, **fresh** voices. They foreclose the market to independents by leveraging their vertical market power and by **self**-supplying product. They exercise their market power as buyers **of** content (monopsony power) with two practices that are especially damaging to competition from independent producers. The **first** is that networks often demand that they be given an equity participation in an independently developed television series in order for it to be placed on the primetime schedule. The second is that basic cable channels owned by members of the oligopoly will not pay license fees **that** are commensurate with the production values and the scope of licensed rights they demand in independently produced TV movies.

EFFECT OF THE VERTICALLY INTEGRATED OLIGOPOLY ON THE TELEVISION MARKET

Fifteen years ago, theatrical movie studios and broadcast television were almost entirely separate while cable television was just developing as a primary outlet. In each of these markets, there was a substantial independent sector. Major studios provided about one third **of** product shown on network prime time television while the networks themselves accounted for just 15%. Non-major studios, **known** as “independents,” supplied nearly one

independents to the market, and impose onerous terms and conditions on independent producers that have further **shrunk** the sector,

While it is extremely difficult to **assess** the impact of **the** changes in the industry on quality, there is no doubt that the independent sector was a consistent source of innovative and high quality content in both the TV series and movies categories prior to the changes in policy.⁴ Measured by both popularity and awards, the independents more than hold their own when given a chance to reach the public. This quantitative evidence reinforces the celebrated anecdotal evidence – shows like *All in the Family* and *Cosby* – frequently offered about the importance of independent production. It is quite clear that **the** elimination **of** independents from **the** high value TV product spaces – prime time and premium cable – cannot be attributed to poor quality of product. It is more readily attributed to changes in the structure of the industry and **the** business practices of **the** dominant, vertically integrated oligopoly.

The key elements of the video entertainment product space fit a pattern that the literature on industrial organization describes as the exercise and abuse of market power.

These elements include:

Market Structure **and** Market Power

- Market shares that have risen to the level traditionally defined as a source **of** concern about concentration setting the stage for **the** abuse of market power.
- Substantial barriers to entry in the industry.
- A history of anticompetitive practices.

Vertical **Integration**

- Barriers to entry increased by vertical integration.

⁴ See Chapter VI **for** a discussion **of** quality.

half. One set of independents sold movies to broadcasters. Another set sold **series** and other programming. A few produced and sold both. Vertical integration has changed that situation.

The vertically integrated major studios and broadcasters now account for over **75%** of broadcast prime time television programming while independents account for less ~~than~~ 20%.

~~The few independents that get on prime-time television produce reality shows, not scripted programming.~~ As a result, independents have been virtually shut out of the lucrative syndication market, now accounting for just 18% of all first run syndication programming hours and none **of** the programming hours for shows that have gone into syndication over the last **two** years.

The economic terrain of cable television has also changed for independents. The vertically integrated media companies own **24** of the top **25** cable channels. The independents' share **of** pay cable programming also continues to decline as a percentage of programming, dropping by some **15%** since the late nineties. Independent product was also squeezed out of syndication. Independent product is increasingly consigned to the ~~far~~ less visible and less financially rewarding basic cable channels where license fees are much lower and in many cases inadequate to cover production costs. Additionally, product placed on basic cable does not have the same potential to realize foreign sales that pay cable product enjoys.

The business practices used to accomplish this dramatic shift in the flow of content in the video product space exhibit characteristics that clearly tit the pattern of **abuse of market.'** By controlling distribution and vertically integrating **into** production, five of the dominant broadcasters have become gatekeepers who favor their **affiliated** content, restrict access of

³ See Chapter V for a discussion of these business practices and their effect on source diversity and independent production of video content.

-
- The foreclosure of markets to unaffiliated producers through favoritism of affiliated upstream production and the subsequent exit of upstream product suppliers from the market.
 - Parallelism and reciprocity among the dominant firms in the oligopoly.
 - A rush to integrate and concentrate across the sector.

Monopsony (buyer) Power over independent producers

- The imposition of prices that squeeze unaffiliated producers and terms that shift risk onto those producers.
- Indications of a decline of quality in product attendant on the abuse of monopsony power.
- Flooding of downstream outlets with integrated product.

POLICY IMPLICATIONS OF CONSOLIDATION AND INTEGRATION

The swift and massive horizontal consolidation and vertical integration in the industry raises a number of concerns. The analysis of the economic impact of horizontal concentration and vertical integration can be found across many areas of economic activity, but the unique nature and role of video entertainment raises additional, perhaps even greater concerns in non-economic areas. Television and movies, the former in particular, are fundamental to democratic discourse. Television is the dominant medium in terms of time spent on entertainment and news and information gathering? It is overwhelmingly the choice for national campaign advertising. Entertainment on television can be cultural, educational or political. Theatrical releases have a prominent role in the public discourse as well, which films such as *Crash* and *The Passion of the Christ* have demonstrated in recent years.

⁵ Cooper Mark, *Media Ownership and Democracy in the Digital Information Age* (Palo Alto: Stanford Law School Center for Internet and Society, 2003).

Television and movies play an important part in the marketplace of ideas. A nation that prides itself on freedom of speech and diversity while simultaneously issuing exclusive licenses to private firms to broadcast content faces a dilemma. The issuance of a handful of broadcast licenses in each market in America creates a privileged class of speakers through

government action. Local governments issue franchises to cable TV operators, which are even more scarce than broadcast licenses on a city-by-city, county-by-county basis.

How one promotes diversity with such a small number of electronic voices, without dictating what content broadcasters should air, becomes a major source of concern. If those very valuable and powerful government-granted platforms for reaching the public become the core of a tight oligopoly that dominates other areas of expression, the concern is compounded.

If dictating content is ruled out by First Amendment free speech concerns, but policy makers continue to strive for diversity, then the primary option is to build media market structures that disperse the opportunity to speak as much as possible within the confines of the granting of licenses and franchises. The principle on which this approach stands is simple. By ensuring a wider opportunity to put content before the public, diversity and discourse are stimulated without dictating the substance of the content supplied.

POLICIES TO PROMOTE DIVERSITY

For much of the twentieth century, the Congress and the Federal Communications Commission pursued this goal of diversity by simultaneously dispersing ownership of production and distribution of content. The number of media outlets that could be owned by a single entity was restricted both within a market (the local television multiple ownership

rule)⁶ and across the nation (a national cap) by the national television multiple ownership rule? The amount of content aired in prime time that any given network could own was limited as well by the Financial Interest and Syndication Rules (Fin-syn) and the Prime Time Access Rules.⁷ Similarly, consent decrees in cases brought by the Department of Justice mirrored the Fin-Syn rules.⁸ Other FCC rules prevented Broadcast license holders from owning other types of media outlets – e.g. newspapers and cable TV systems (cross-ownership limits)⁹ -- and restricted their ability to engage in cross-media ownership (e.g. radio).¹⁰ The result was a substantial dispersion of ownership of content.

In the 1990s, the two primary policies to promote diversity of ownership of content in broadcasting were eliminated or cut back. The Financial Interest and Syndication Rules (Fin-Syn) that governed prime time programming were allowed to expire and the consent decree was also vacated – allowing broadcasters to own as much programming as they wanted. The

⁶ 47 C.F. R. 73.355(b), the duopoly rule, lifted the ban on multiple station ownership, but 47 C.F.R. 73.658(g), the dual network rule, restricted the combinations of television stations, to disallow dual or multiple network ownership that involves a combination between ABC, CBS, Fox, or NBC. Citations to the rules are currently being reviewed, which generally relaxed the restrictions on cross ownership in the 1990s and are the latest in the evolving regulatory structure.

⁷ 47 C.F. R. s 73.3555(e)

⁸ The two rules have always been closely linked see Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting, 23, FCC 2d 282 (1970). Amendment of Part 73 of the Commission's Syndication and Financial Interest Rule, 47 FR 32959 (1982), as they were in the court case that led to their ultimate expiration, see *Shurz Communication Inc. v. FCC* 982 F. 2d 1043,1049 (7th Cir. 1992).

⁹ Identical consent decrees were entered against the three major networks, which followed the Fin-syn rules closely. These were vacated when in the early 1990s, as the Fin-syn rules were allowed to expire...

¹⁰ 47 C.F. R. s 73.3555(d), cross-ownership of broadcast states and newspapers, prohibits the common ownership of a daily newspaper and a broadcast station in the same market.

¹¹ 47 C.F.R. 73.3555(c), the radio-television cross-ownership rule, limits the number of TV and radio licenses that can be held within a market.

limits on multiple station ownership were relaxed – allowing them to own two stations in the nation's largest and most important markets. A third policy also gave broadcasters the right to carriage on cable systems (**must-carry/retransmission**).¹² The terrain **of the** American media landscape was dramatically altered by these policy changes as the broadcasters moved quickly to use these three new sources of leverage in the video market.

Whether or not Congress anticipated the powerful effect that the policy changes of the 1990s would have on diversity of ownership of programming is unclear. Although the FCC has created records on these issues in its proceedings subsequent to the changes in policy, the courts have remanded several of its **rules**,¹³ leaving their regulatory status in flux and Congress has included a provision that requires frequent review of the **rules**.¹⁴

The FCC continues to have the authority to implement restrictions on media ownership to accomplish the goals that Congress has set in legislating media **policy**,¹⁵ with the exception of the national multiple ownership rule. To the extent that Congress continues to embrace the goal of diversity, the current situation and how the policy changes of the 1990s created it are what matters now. Moreover, since Congress ordered the FCC in the Telecommunications Act of 1996 to periodically review its rules, the FCC could conclude that

¹² Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

¹³ Indeed, all of the major structural **rules** written in the late 1990s have been remanded by the court (broadcast multiple station limits, cable horizontal limits, newspaper cross ownership) or overridden by Congress (national cap).

¹⁴ The 1996 Act provided for a biennial review (*Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996)). This was later extended to four years (*FY2004 Consolidated Appropriations Act* (Public Law 108-109, 118 Stat. 3 et seq. Section 629) and prohibited the FCC from further reviewing the national cap.

¹⁵ As with the other rules overturned by the courts, in the case of the Fin-Syn rules, while the courts rejected the specific FCC rule (*Schurz Communications Inc. v. FCC* 982 F. 2^d 1043 (7th Cir. 1992)), it did not preclude the Writing of an alternative rule. To date, the FCC has elected not to do so.

the **rule** changes it has implemented with agency discretion have harmed diversity, a goal that Congress continues to embrace. **The** FCC could re-institute those policies that successfully promoted source diversity in the past or it could seek new policies that will promote source diversity in the future.

This paper shows that the current policies are not promoting independent production of video content on the major television platforms. Understanding the impact of past rule changes is **the** first step in the process of re-examining the decline of sources diversity on television. That is the subject of this paper. While the purpose of this paper is not to recommend specific policy changes, it is clear that if policymakers still believe in source diversity, then a change in policy that directly alters the structure and conduct of the vertically integrated oligopoly are is necessary.

OUTLINE

The paper is based on four sources of **data**:

- Over a dozen interviews with executives involved in the production of content for television, theatrical and video release.
- A review of **the** academic literature
- A review of the trade and popular press
- A database that charts market shares in every major domestic and foreign platform for exhibition and release of audiovisual product.

Chapter II outlines the basic issues and analytic approaches. It first describes the product space I **am** studying and then the analytic approach that I take.

Chapter III describes the policy changes and subsequent changes in market structure and conduct of the vertically integrated video entertainment product space. First it examines

the impact of the repeal of the Fin-Syn rules on the market structure of the video entertainment product spaces. Then it surveys the current state of the video entertainment product space.

Chapter IV examines the change in the sources of content that resulted **from** the change in market structure. It begins with an analysis of prime time and broadcast programming. Then it turns to **the** patterns of distribution of TV movies, which includes a great deal **of** cable content. Finally it **assesses** the importance of prime time broadcasting to the overall video entertainment product sector.

Chapter V discusses the impact of the market structure on the production and distribution of content. **The** focus is on the gate-keeping role of the vertically integrated movie/broadcast/cable companies.

Chapter VI reviews that debate over the impact of **the** vertically integrated oligopoly on the **quality** of programming.

Chapter VII offers **some** concluding observations on the role of the Internet.

11. DEFINING THE PRODUCT SPACE AND ANALYTIC APPROACH

THE OBJECT OF STUDY

This is a study of the industrial organization of the video entertainment sector – theatrical movies, all forms of television and the sale and rental of tapes and DVDs – in the United States. Because the sector is complex, I adopt the following definitions. The sector consists of six primary channels for the distribution of content:

- theatrical movie releases,
- prime time airing of movies and series on broadcast television,
- syndication on broadcast television in non-prime ~~time~~ slots of both movies and series,
- movies and series aired on pay cable,
- movies and series aired on basic cable networks,
- Home Video – i.e. sale/rental of video for viewing on VCR and DVD players.

I refer to the overall sector made up of the six distribution channels as the video entertainment product space. The Internet has just begun to be used as a means of redistributing video product that was originally released through one of the other six outlets. While there are clear indications that it will change the current terrain of the video entertainment product space in the long run, there **are** also clear indications that it will not deconcentrate the sector. Already, the networks are multicasting current primetime programming through their websites and Internet protocol television (IPTV) channels are coming on line. Internet video on demand services (VOD), such as Cinema Now and Movielink, are gaining visibility and subscribers as broadband service penetrates deeper into

the consumer market, but the same content producers dominate. Broadcasters are poised to receive a substantial increase in their ability to distribute content with the transition to digital multicasting. The current single channel will be expanded by the granting of rights to use spectrum to broadcast up to six channels digitally. As such, there is growing concern that the same entities that dominate the traditional channels of physical distribution of video entertainment product will extend their dominance to the new Internet and digital distribution channels.

The nature and relationship between these channels has changed over time. Terms of art once applied have stuck, even though they may no longer technically describe the distribution channel.

Theatrical distribution of movies has been around the longest, with the commercial industry stretching back to the early part of the 20th century. Television emerged in the 1950s and 1960s. Cable arrived in the 1970s and 1980s. Distribution of video tapes began in the 1980s and exploded with the advent of DVDs in the early 2000s.

Traditionally, television was divided between broadcast and cable to reflect the different means of delivery. Broadcasters sent signals over the air from TV transmitters (stations) that were licensed by the FCC. Cable signals were sent from a head end through a wire, the laying of which was franchised by a local entity. Today, although broadcast signals are still available over-the-air, most American households (80% to 90%) get the broadcast product **through** the cable wire or **from** satellites.

Prime time on broadcast TV was always a focal point of policy because of the huge audience and resources it commanded. **Prime** time was controlled by the networks, which also held licenses to operate TV stations in the largest markets. They created national

networks by affiliating with independent license holders in markets where they did not hold broadcast licenses directly. The major networks – ABC, NBC and CBS, reach virtually every home in America. Fox is a national network as well, although it may be available in somewhat fewer homes.

Although cable has always been a subscription service, it split into two different distribution channels when pay cable services, like HBO, developed the ability to charge a premium for programming and basic cable became advertiser supported, mimicking broadcast television. Historically, one could draw a clear line between production of content by movie studios and exhibition – the presentation to the public of product – in theaters. The distinction breaks down with live television – the broadcast is simultaneously produced and distributed. Television also changes the nature of the exhibition from a public space to a private space, although it is still shared in the sense that programming is watched simultaneously, but separately, by large numbers of people. The sale/rental of videos (and the recording of programming) for home viewing (referred to as Home Video) extended the change from a public to a private experience by allowing people to choose when to watch.

ANALYTIC APPROACH: STRUCTURE, CONDUCT PERFORMANCE

The paper applies a framework of analysis known as the structure-conduct-performance paradigm (see Exhibit 11-1),¹⁶ which has been the dominant approach to industrial organization analysis for over three-quarters of a century. The premise is simple.

¹⁶ Scherer, F. M. and David Ross, *Industrial Market Structure and Economic Performance* (Boston, Houghton Mifflin: 1990); Shepherd, William, G., *The Economics of Industrial Organization* (Prentice Hall, Engelwood Cliffs, N.J., 1985).

The analysis **seeks** to identify the conditions that determine the performance of markets.¹⁷ It starts with basic **conditions**.¹⁸ On the supply-side these include factors such as technology, product durability, business attitudes and the legal framework. On **the** demand side factors such as price elasticity, cyclical/seasonal patterns, and purchasing methods are included. These interact with characteristics of the market structure,¹⁹ such as the number

¹⁷ Id., p. 4.

We seek to identify sets of attributes or variables that influence economic performance and to build theories detailing the nature of the links between these attributes and end performance. **The** broad descriptive model of these relationships used in most industrial organization studies was conceived by Edward S. Mason at Harvard during **the** 1930s and extended by numerous scholars.

Shepherd, William, G., *The Economics of Industrial Organization* (Prentice Hall, Engelwood Cliffs, N.J., 1985), p. 5, presents a similar view.

¹⁸ Scherer and Ross, p. 5.

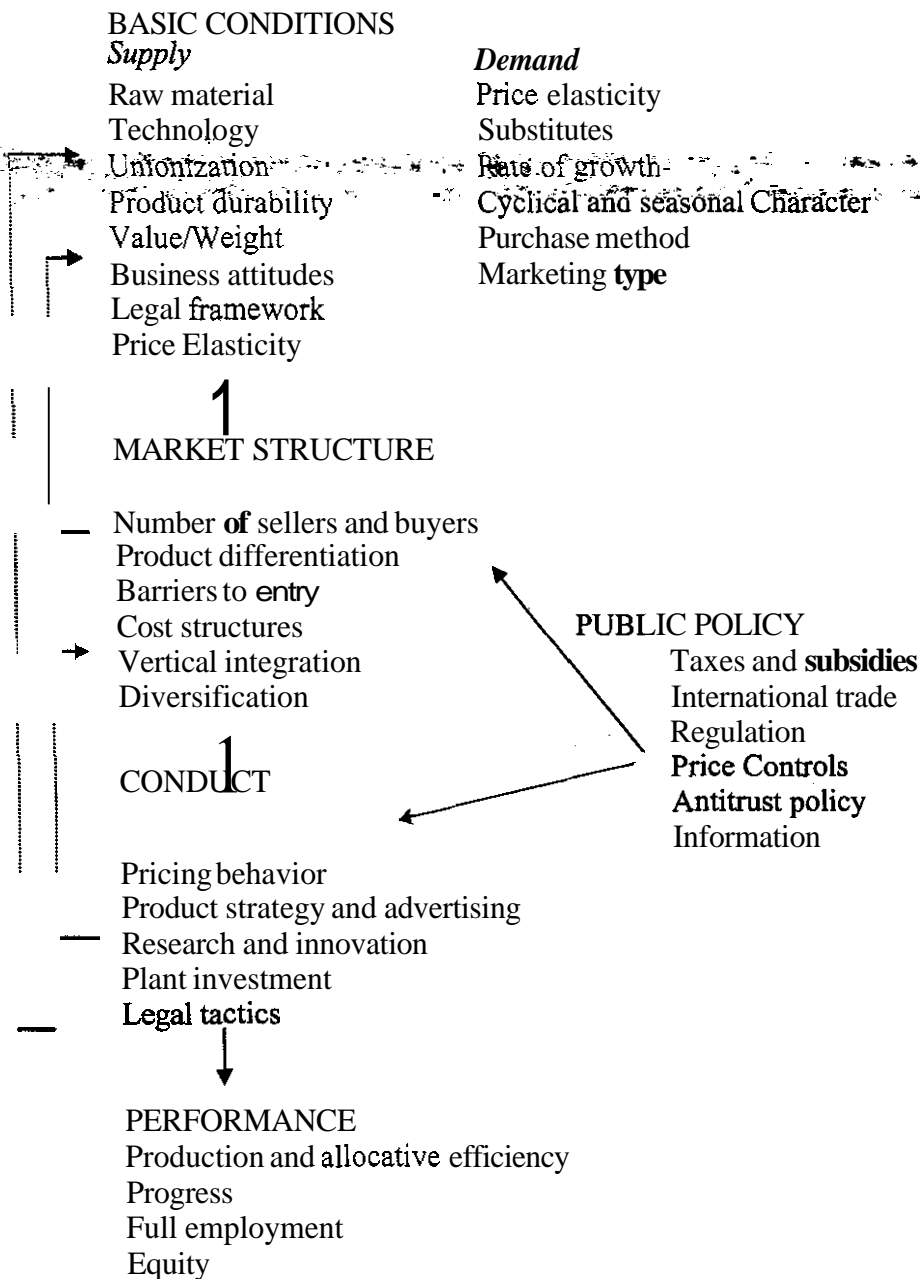
Market structure and conduct are also influenced by various basic conditions. For example, on the supply side, basic conditions include the location and ownership of essential raw materials; the characteristics of the available technology (e.g. batch versus continuous process productions or high versus low elasticity of input substitution); the degree of work force unionization; the durability of the product; the time pattern of production (e.g. whether goods are produced to order or delivered from inventory); the value/weight characteristics of the product and so on. A list of significant basic conditions on the demand side must include at least the price elasticity of demand at various prices; the availability of (and cross elasticity of demand for) substitute products; the rate of growth and variability over time of demand; the method employed by buyers in purchasing (e.g. acceptance of list prices as given versus solicitation of sealed bids versus haggling); and the marketing characteristics of the product sold (e.g. specialty versus convenience shopping method).

¹⁹ Scherer and Ross, p. 5.

Conduct depends in turn upon the structure of the relevant market, embracing such features as the number and size distribution of buyers and sellers, the degree of physical or subjective differentiation prevailing among competing seller's products, the presence or absence of barriers to entry of new firms, the ratio of fixed to total costs in the short run for a typical firm, the degree to which firms are vertically integrated from raw material production to retail distribution and the amount of diversity or conglomerateness characterizing individual firms' product lines.

Exhibit II-1:

The Structure-Conduct-Performance Paradigm



SOURCE: Scherer and Ross, F. M., and David Ross, *Industrial Market Structure and Economic Performance* (Houghton Mifflin Company: Boston, 1990), p. 5.

and the size of sellers and buyers, product differentiation, cost structures and vertical integration (the relationship of production **and** distribution), to determine the conduct of the market participants. The key **types** of conduct include pricing behavior, product strategy and advertising, and **legal** tactics.²⁰ Conduct determines performance, traditionally measured in terms of pricing and profits, but increasingly, viewed as quality and the nature and speed of innovation.

One of the key features of the structure-conduct-performance paradigm is that it recognizes the importance of public policy. Policies, such as antitrust enforcement, regulation, or taxation and subsidization, can directly affect structure and conduct, thereby altering performance.

HORIZONTAL MARKET POWER

The characteristic of market structures that received most public policy attention is horizontal market power. The concern is that if markets become concentrated – i.e. **where** a few players have a large market share – competition is dulled. Rather than compete to produce the best product at the lowest price, **one** large entity may be able to set prices up **or** otherwise affect output, without a sufficient response from others to discipline such behavior. With small numbers of competitors, they may accomplish the **same** thing by consciously paralleling each other's behavior. **Thus**, the **Department** of Justice defines market **power as**

²⁰ Scherer and Ross, p. 4.

Performance in particular industries or **markets** is said to depend upon the conduct of **sellers** and buyers in such matters **as** pricing policies and practices, overt and tacit **interfirm** cooperation, product line and advertising strategies, research and development commitments, investment in production facilities, legal tactics (e. g. enforcing patent rights), and *so on*.

“the ability profitably to maintain prices above competitive levels for a significant period of time... . Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service or innovation.”²¹

Pure and perfect competition is rare, but the competitive goal is important.”

Therefore, public policy pays a great deal of attention to the relative competitiveness of markets as well as the conditions that make markets more competitive or workably competitive. Knowing exactly when a market is “too” concentrated is a complex question.

The Department of Justice calculates an index called the Herfindahl-Hirschman Index (HHI) to categorize markets (see Exhibit 11-2). This index takes the market share of each firm, squares it and sums it. It considers a market with an HHI above 1000 to be concentrated. This is the equivalent of a market with fewer than the equivalent of 10-equal sized firms. It considers a market with fewer than the equivalent of approximately 5.5-equal sized firms (HHI = 1800) to be highly concentrated. Markets with an HHI between 1000 and 1800 are considered moderately concentrated.

²¹ Department of Justice/Federal Trade Commission, *Merger Guidelines* (1997).

²² Scherer and Ross, p. 16-17.

In modern economic theory, a market is said to be competitive (or more precisely, purely competitive) when the number of firms selling a homogeneous commodity is so large, and each individual firm's share of the market is so small, that no individual firm finds itself able to influence appreciably the commodity's price by varying the quantity of output it sells... Homogeneity of the product and insignificant size of individual sellers and buyers relative to their market (that is, atomistic market structure) are sufficient conditions for the existence of pure competition, under which sellers possess no monopoly power. Several additional structural conditions are added to make competition in economic theory not only “pure” but “perfect.” The most important is the absence of barriers to entry of new firms, combined with mobility of resources employed.

**Exhibit 11-2:
Describing Market Concentration for Purposes of Public Policy**

DEPARTMENT OF JUSTICE MERGER GUIDELINES	TYPE OF MARKET	EQUIVALENTS IN TERMS OF EQUAL SIZED FIRMS	HHI	4-FIRM SHARE (%)
	Monopoly	1 Firm with 65% or more	4250<	100
	Duopoly	2	5000<	100
		5	2000	80
HIGHLY CONCENTRATED ↑	Tight Oligopoly		1800 OR MORE	
		6	1667	61
UNCONCENTRATED ↓	Loose Oligopoly	10	1000	40
	Atomistic Competition	50	200	8

Sources: U.S. Department of Justice, *Horizontal Merger Guidelines*, revised April 8, 1997, for a discussion of the HHI thresholds; Shepherd, William, G., *The Economics of Industrial Organization* (Prentice Hall, Englewood Cliffs, N.J., 1985), for a discussion of 4 firm concentration ratios.

Many economists describe markets in terms of the market share of the top four **firms**.

Shepherd describes **these** thresholds in terms of four-firm concentration ratios **as follows**.²³

Tight Oligopoly: The leading four firms combined have 60-100 percent of the market; collusion **among** them is relatively easy.

Loose Oligopoly: The leading four firms, combined, have 40 percent or less of the market; collusion among them to **fix** prices is virtually impossible.

Although the overlap is not perfect, there is a close correspondence between these **two** approaches. A highly concentrated market is called a tight oligopoly. A moderately concentrated market is called a loose oligopoly.

²³ Shepherd, p. 4.

MONOPSONY POWER

A second economic concept that plays an important part in the video entertainment product space is that of monopsony power. Monopsony power is the flip side of monopoly power. Monopoly power is the power of a seller to dictate prices, terms and conditions as a seller of goods and services to the public. Monopsony power is the power of downstream buyers of inputs to create products to sell to the public and to dictate the prices, terms and conditions on which they buy those inputs. If the upstream suppliers lack alternatives, they may be forced to accept terms that under compensate them or force them to bear extra risk. The downstream buyers have market power over the upstream sellers of the product. This can result in the production of fewer or inferior products for sale downstream.

Although monopsony has not been the focal point of much antitrust action, it is more likely in precisely the type of sector like the video entertainment product space, where inputs are specialized

Monopsony is thought to be **more** likely when there are buyers of specialized products or services. For example, a sports league may exercise monopsony (or oligopsony) power in purchasing the services of professional athletes. An owner of a chain of movie theaters, some of which **are** the sole theaters in **small** towns, may have monopsony power in the purchase or lease of movies. Cable TV franchises may exercise monopsony power in purchasing television channels that will be offered **to** their subscribers.²⁵

VERTICAL INTEGRATION AND LEVERAGE

A third key characteristic of many industries is the extent of vertical integration. In many industries the act of producing a product can be readily separated from its distribution and sale. Production is referred to **as** the upstream, distribution and sale are referred **to as** the

²⁴ Shepherd, p. 4.

²⁵ Sullivan and Grimes, p. 138.

downstream. Vertical integration occurs when both activities **are** conducted by **one** entity.

Because vertical integration involves the elimination of a (presumably market-based) transaction between two entities it has been the focal point of a great deal of analysis.

Economic efficiencies **are** frequently claimed for vertical integration due to the elimination of transaction costs. Others fear inefficiency and potential abuse of the ability to leverage vertical market power that can result from excessive or unjustified vertical integration.

The classic concern is that distributors of content, who are also producers, favor their own content at the expense of the content of unaffiliated producers. Vertical integration may become **the** norm in the industry, making it difficult for **unintegrated** producers to survive. Vertically integrated entities may capture the market for inputs, making it difficult for independent entities to obtain the factors **of** production necessary to produce product. Also, with vertically integrated entities dominating a sector, reciprocity and forbearance rather than competition may become the norm.

CONCLUSION

The remainder of this paper documents the emergence of a vertically integrated tight oligopoly in the video entertainment product space. It shows that when public policies that prevented **the** exercise of market power were relaxed **or** eliminated, the conditions for the exercise of market power were quickly created by mergers and acquisitions and changes in behavior. The industry became a vertically integrated, tight oligopoly. Vertical leverage was used to eliminate independent production of prime time content. Monopsony power was exercised to squeeze independent film production into a **very** narrow, niche space on basic cable channels.

III. PUBLIC POLICY AND THE EMERGENCE OF A VERTICALLY INTEGRATED OLIGOPOLY IN VIDEO ENTERTAINMENT

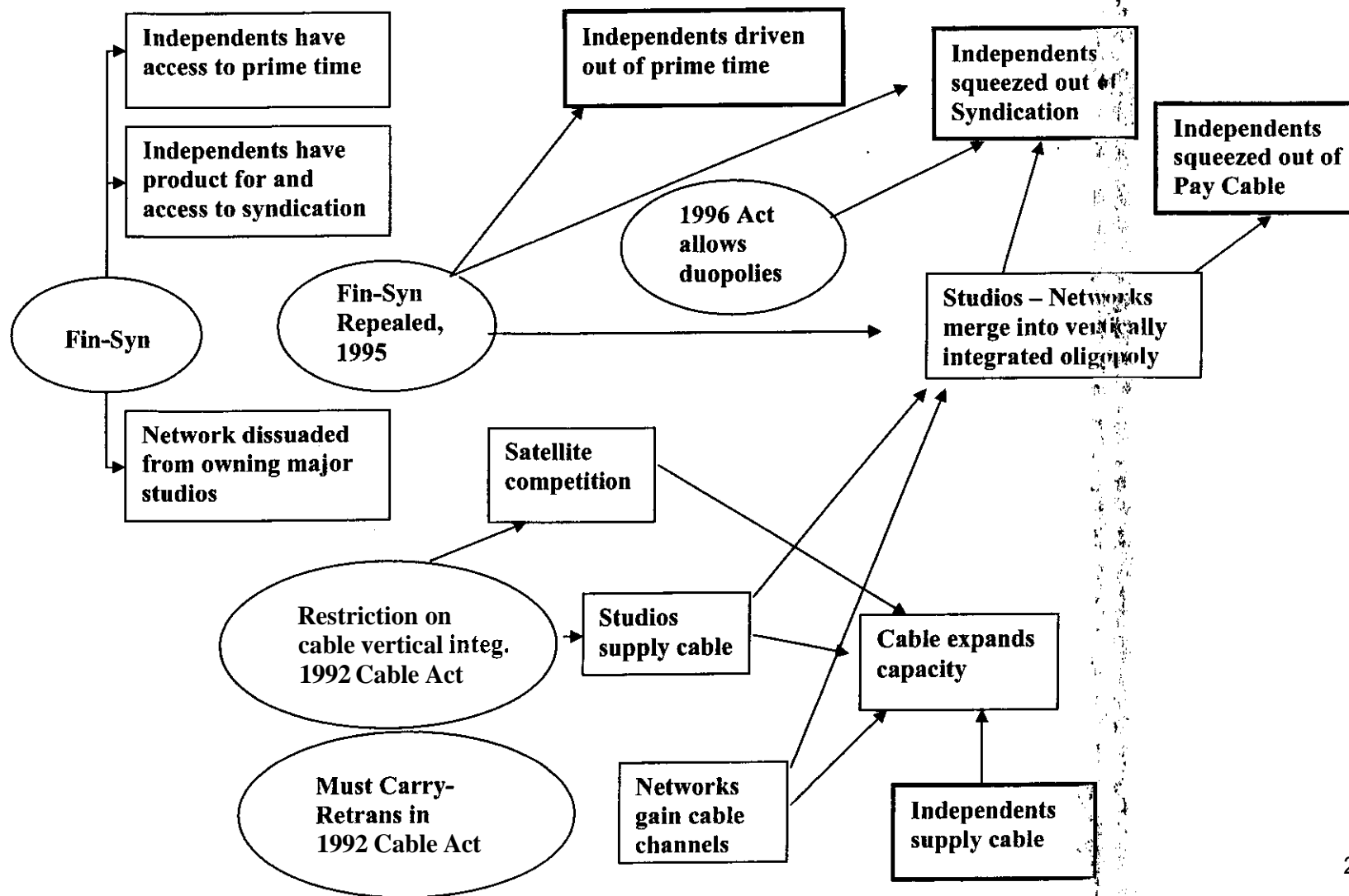
THE REPEAL OF FINANCIAL AND SYNDICATION RULES TRIGGERS HORIZONTAL CONCENTRATION AND VERTICAL INTEGRATION

At the end of the 1980s, policies to disperse ownership in broadcast television were in place. Though they had been debated intensely throughout the 1980s, the policies remained to limit holders of broadcast licenses to one to a market. These stations were known as O&Os (owned and operated). Holders of broadcast licenses could have O & O stations that reached no more than **25%** of the nation's television households. **The** national broadcast networks were restricted in the amount of content that aired in prime time they could own and their participation in the syndication of non-prime time programming (**the** Financial and Syndication Rule). The broadcast networks filled out their national networks by entering into affiliation agreements with stations they did not **own** or operate. There were extensive rules that governed the relationships between the affiliated stations and the networks.

Exhibit III-1 identifies the key policy changes (ovals) and the structural and conduct changes that followed (rectangles) in the **1990s**. The primary policy that triggered the vertical integration in the industry was the decision of the FCC to allow the Financial and Syndication Rules to lapse, rather than **write** rules that would pass court scrutiny. (*see* Exhibit III-1). In retrospect, it is quite clear that

Exhibit III-1:

The Impact of 1990s Policy Changes on Independents in the Television Market



the Financial and Syndication rules, which restricted the amount of broadcaster-owned programming in prime time, had a major effect on the diversity of not only the broadcast television market, but television in general. When the rules were eliminated in the mid-1990s, broadcasters moved to replace the lion's share of independent programming with content they produced. Self-dealing became the predominant mode of operation.

Ironically, the impact was more profound than the direct effect on prime time. At the time that the Fin-Syn **rules** were relaxed, restrictions on vertical integration in the cable industry were implemented. Cable operators were restricted in the percentage of capacity on their systems they could fill with programming they owned. In the Cable Consumer Protection Act of 1992 they were also required to make their own programming available to competing delivery systems (the program access **rules**). As a result of **the** improved access to programming, satellite competition, which had been anticipated in the 1984 Cable Act, finally increased its market share. Satellite was a digital technology with greater capacity than cable. The cable industry responded by deploying its own digital capacity. Thus, just as the broadcast space was closing, the cable space opened for the majors and independents. The studios, which had been prevented from integrating with broadcasters, funded and supplied programming for cable channels. Given their structure, they could not provide nearly all the programming that a 24/7 channel required. A substantial market for independent movie production opened up.

Majors and independents were not **the** only beneficiaries of the 1992 Cable Act. The Act also gave the broadcasters a wedge into the cable platform, with the must carry/retransmission rules. **Cable** operators needed to carry the major broadcast networks to make their basic subscription packages attractive to the public. **The** Cable Act of 1992 gave the broadcasters